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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GARY OZENNE, Plaintiff and Appellant, v. CHASE MANHATTAN BANK et al., Defendants and Respondents.	E033043 (Super.Ct.No. RIC 377176) OPINION

APPEAL from the Superior Court of Riverside County. Dallas Holmes, Judge. Affirmed.

Louis G. Bruno for Plaintiff and Appellant.

Houser and Allison, Eric D. Houser and Jeffrey S. Allison for Defendants and Respondents Chase Manhattan Bank and Ocwen Federal Bank.

Buchalter, Nemer, Fields & Younger, Adam J. Bass, Rachael H. Berman and Raquel Vallejo for Defendant and Respondent Ameriquest Mortgage Company.

1. Introduction[1]

Plaintiff Gary Ozenne claims to be the victim of predatory lending practices. Based on the doctrine of judicial estoppel and the statute of limitations, we hold the trial court did not abuse its discretion by sustaining without leave to amend the demurrers of defendants Chase Manhattan Bank, Ocwen Federal Bank, and Ameriquest Mortgage Company to Ozenne's amended complaint.[2]

2. Factual and Procedural Background

In reviewing the lower court's ruling on demurrer, we base our statement of the factual and procedural background on the pleadings and such matters as may be judicially noticed.[3]

In his amended complaint, Ozenne alleges that, in February 1998, he applied to Ameriquest to refinance the existing first mortgage on his home and to reduce his payments by about $900 per month. The disclosure documents stated the loan would be in the amount of $124,000 at a fixed interest rate of 10.5 percent. On April 25, 1998, when Ozenne signed the final loan documents, the loan was for the reduced amount of

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[1] We deny that part of Ozenne's request for judicial notice, filed July 2, 2003, that we reserved for consideration on appeal by this court's order dated July 11, 2003. We also deny Ameriquest's motion to augment filed August 11, 2003, that we deemed a request for judicial notice and reserved for consideration on appeal by this court's order dated August 15, 2003.

[2] *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.

[3] *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713-716.

$116,250 at an adjustable interest rate of 14.5 percent. Despite other deficiencies and misrepresentations, Ozenne accepted the loan because he felt he had no choice.

Three years later, on April 24, 2001, Ozenne gave written notice of rescission and tender to Ocwen, whom he alleges was the servicing agent on the loan. Ocwen ignored the notice and tender and eventually foreclosed on Ozenne's house in July 2002.

In the meantime, between 1997 and 2002, Ozenne filed seven successive bankruptcy petitions, an initial Chapter 7 proceeding, followed by six Chapter 13 proceedings. The Ameriquest refinance occurred between the second and third bankruptcies (the first and second Chapter 13 proceedings.) In April 2002, as part of the seventh bankruptcy (the sixth Chapter 13), Ozenne filed an adversary proceeding against Chase, Ocwen, and Ameriquest, asserting causes of action for rescission of the April 1998 loan, for unfair business practices, and for negligence.

On June 13, 2002, based on the principle of judicial estoppel, the bankruptcy court dismissed Ozenne's seventh bankruptcy action with prejudice.

On June 21, 2002, Ozenne filed his original civil action for quiet title, rescission, violations of the federal truth-in-lending and fair debt collection acts, unfair business practices, and "tort in essence." In July 2002, he sought an ex parte order to prevent the trustee's foreclosure sale of his property. Ultimately, the foreclosure sale was concluded on July 31, 2002.

Both Ameriquest, Ocwen, and Chase Manhattan demurred to the original complaint. The court sustained the demurrers with leave to amend.

The amended complaint asserts causes of action for "enforcement of and damages for rescission," to quiet title, to set aside sale of real property, for "fair debt collection practices," for unfair business practices, and for "tort in essence." Defendants demurred for failure to state a cause of action[4] and for lack of subject matter jurisdiction.[5] Defendants argued judicial estoppel barred the civil action. The trial court agreed and, for that reason, the statute of limitations, and other grounds, again sustained defendants' demurrers, but without leave to amend, and dismissed the civil action with prejudice.

Afterwards, the bankruptcy court dismissed the adversary proceeding with prejudice.

3. Judicial Estoppel

Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process."[6]

The bankruptcy court applied judicial estoppel to dismiss the Chapter 13 proceeding and later to dismiss the adversary proceeding. Similarly, the superior court applied judicial estoppel to sustain defendants' demurrers and to dismiss the civil action.

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[4] Code of Civil Procedure section 430.10, subdivision (e).

[5] Code of Civil Procedure section 430.10, subdivision (a).

[6] *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.

On appeal, the parties continue to disagree about the effect of Ozenne's multiple bankruptcies on his civil action. Defendants again maintain judicial estoppel bars the civil case. Ozenne contends his complaint for rescission and other causes of action is not a "claim" to which judicial estoppel applies and, further, the superior court should have conducted an evidentiary hearing on its application. The issue we consider is whether it can be said, as a matter of law, that Ozenne adopted inconsistent positions regarding the Ameriquest loan in his bankruptcies and his civil action, causing judicial estoppel to operate.

Under federal law, a party may be judicially estopped from bringing a civil suit when he fails to raise the claim in a previous bankruptcy.[7] In *Oneida Motor Freight, Inc. v. United Jersey Bank*,[8] a bankruptcy debtor could not assert a postbankruptcy lender-liability claim after failing to list the claim in the bankruptcy proceedings.[9] In *Hamilton v. State Farm Fire & Casualty Company*,[10] the Ninth Circuit held a plaintiff was judicially estopped from bringing a bad-faith insurance claim when he had failed to identify the claim in an earlier bankruptcy.

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[7] *Hamilton v. State Farm Fire & Casualty Company* (2001) 270 F.3d 778, 783-784.

[8] *Oneida Motor Freight, Inc. v. United Jersey Bank* (3d Cir. 1988) 848 F.2d 414.

[9] *Oneida Motor Freight, Inc. v. United Jersey Bank, supra,* 848 F.2d at page 415.

[10] *Hamilton v. State Farm Fire & Casualty Company, supra,* 270 F.3d at page 782.

California courts follow the same rule. For example, in *Conrad v. Bank of America*,[11] plaintiffs' fraud claim against a lender was barred because it had not been raised in previous bankruptcy proceedings. Similar applications of judicial estoppel occurred in *International Engine Parts, Inc. v. Feddersen & Co.*[12] and *Thomas v. Gordon*.[13]

In *Thomas*, the court explained: "Although the precise parameters of the doctrine have not been clearly defined . . . it quite clearly should be applied in the following situation: when '"(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]' [Citations.]"[14]

None of these cases support Ozenne's position that judicial estoppel applies only to a "claim" in contrast to what Ozenne characterizes as the assertion of a "legally vested right." Instead, *Thomas* speaks in terms of two totally inconsistent "positions," which could encompass within its meaning a claim for rescission.

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[11] *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 151-155, 160.

[12] *International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 349.

[13] *Thomas v. Gordon* (2000) 85 Cal.App.4th 113.

[14] *Thomas v. Gordon, supra,* 85 Cal.App.4th at page 118.

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Thomas also rejects the argument that the third criterion -- that the party be successful in asserting its first position -- is essential to the doctrine. Instead, *Thomas* held that judicial estoppel could apply where there has been egregious conduct, as when a plaintiff made multiple omissions in an earlier bankruptcy.[15] *Thomas* also acknowledged that the automatic stay afforded in bankruptcy affords immediate protection to the debtor, another way of satisfying the third criterion.

Other cases have held the court should make a factual determination regarding whether there has been fraud or knowing misrepresentation before applying judicial estoppel, meaning that the doctrine cannot be employed on demurrer.[16] But we do not think that requirement should operate in the present circumstances.

Although Ozenne tries to suggests his inconsistent positions resulted from ignorance or mistake, he does not support his position with appropriate citations to the record. Ozenne does not demonstrate on appeal that his bankruptcy filings suffered from "technical non-compliance" and his or his bankruptcy counsel's confusion. Ozenne identifies nothing in the record to support his assertion that "[t]he facts in this case make it clear that, if the trial court had conducted a hearing to determine the facts, the testimony and transcripts would have clearly supported that court exercising its discretion

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[15] *Thomas v. Gordon, supra,* 85 Cal.App.4th at page 119.

[16] *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018-1020; *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 511.

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and not adopting the Bankruptcy Court's finding of judicial estoppel." The inadequacy of Ozenne's appellate presentation means we may disregard most of it.[17]

Instead, as recognized by both the bankruptcy court and the superior court, the record shows Ozenne repeatedly failed to list his claim against defendants in the bankruptcy schedules. Instead, in his sixth bankruptcy proceeding, even after he had tried to rescind the Ameriquest loan, he listed the loan on schedule D as a secured lien to Ocwen and proposed a repayment plan. In his seventh bankruptcy proceeding, he listed the Ameriquest loan on schedule F as a disputed unsecured obligation to Ocwen, with no mention of Chase or Ameriquest, and also filed the adversary proceeding. In the order dismissing defendant's last bankruptcy case with prejudice, the bankruptcy court called Ozenne's positions "entirely" inconsistent and said ". . . this court may invoke judicial estoppel not only to prevent Ozenne from gaining an advantage by taking the inconsistent position he now asserts, but also because of the general consideration of the orderly administration of justice and regard for the dignity of judicial proceedings. Ozenne definitely appears to be playing fast and loose with the court."

As the court observed in *Thomas*: "Assuming that the doctrine of judicial estoppel should be applied to an unsuccessful litigant only in the rare situation where the litigant has made an egregious attempt to manipulate the legal system . . . 'this is as egregious as

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[17] *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.

it gets . . . .'"[18] Because Ozenne's conduct was indisputably egregious, the trial court did not abuse its discretion in applying judicial estoppel and sustaining defendants' demurrers without leave to amend.

4. Statute of Limitations

We can also uphold the ruling of the trial court based on the statute of limitations. Ozenne does not contest the trial court's finding that the applicable statute of limitations bar his causes of action for violations of Business and Professions Code sections 17200 and 17500 and his rescission claim under Civil Code section 1689. What remains is Ozenne's fundamental claim he could properly rescind the loan based on defendant's violations of the Federal Truth in Lending Act. His rescission-based claims are subject to an absolute three-year statute of limitations, requiring him to bring an action within three years of the date the Act was violated, that is, when the alleged false disclosures were made.[19] Any damages claim would be subject to a one-year limitations period.[20]

Here the subject loan was consummated on April 25, 1998. On April 24, 2001, Ozenne tried to rescind the loan by sending a notice to Ocwen, the loan servicing agent. Admittedly no notice of rescission was given to Ameriquest, the original lender, or its

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[18] *Thomas v. Gordon, supra,* 85 Cal.App.4th at page 119.

[19] United States Code section 1635, subdivision (f). *King v. California* (1986) 784 F.2d 910, 913; *Miguel v. Country Funding Corp.* (9th Cir. 2002) 309 F.3d 1161, 1164.

[20] United States Code section 1640, subdivision (e). *Hubbard v. Fidelity Federal Bank* (1993) 824 F.Supp. 909.

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successor, Chase Manhattan. The adversary proceeding and the civil action were not filed until 2002, after the three-year period for rescission had expired. Because Ozenne did not attempt to rescind against the proper entity within the three-year limitation period, his right to rescind expired.[21]

Ozenne's reliance on *Beach v. Ocwen Federal Bank*[22] is misplaced. There the United States Supreme Court held the statutory right to rescind under the Act may not be revived as a recoupment defense beyond the 3-year expiration period. *Beach* is not authority for tolling the limitations period on Ozenne's rescission claim against defendants.

5. Disposition

We affirm the judgment. Defendants shall recover their costs on appeal.

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/s/ Gaut
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ King
J.

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[21] *Miguel v. Country Funding Corp., supra,* 309 F.3d at pages 1164-1165.

[22] *Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 417-419.